OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

July 13, 2016

Via electronic mail
Mr. Johnathan Hettinger
News Reporter
The News-Gazette
15 East Main Street
Champaign, Illinois 61820
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Via electronic mail
Ms. Laura J. Hall
Assistant City Attorney
City of Champaign
102 North Neil Street
Champaign, Illinois 61820
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RE: FOIA Request for Review – 2016 PAC 41092

Dear Mr. Hettinger and Ms. Hall:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2014)). For the reasons discussed below, the Public Access Bureau concludes that communications pertaining to the transaction of public business that were sent or received on the personal cellphone and personal e-mail account of the chief of police of the City of Champaign (City), as well as portions of his personal cellphone bill that document communications related to his public duties, are public records subject to the requirements of FOIA. This office further concludes that, with the exception of those records, the City conducted a reasonable search for records responsive to Mr. Johnathan Hettinger's March 14, 2016, FOIA request.

On that date, Hettinger, on behalf of *The News-Gazette*, submitted a FOIA request to the City's Police Department (Department) seeking copies of records of two traffic stops. The request further stated:

> I would also like all phone records of Police Chief Anthony Cobb on April 19, 2014, including his personal phone because it was allegedly used to conduct official business and therefore should be considered a public record.
>
> I would also like all communication to or from Police Chief Anthony Cobb containing the words "Bryant" or "Harvey" in 2014.
>
> I would also like all communication to or from Police Chief Anthony Cobb containing the words "martel" or "miller" in September 2015.[1]

On March 24, 2016, the City responded on behalf of the Department by providing records concerning the traffic stops and by stating that it did not possess any records responsive to the remaining portions of the request. Mr. Hettinger's Request for Review disputes that response, asserting that "governmental phone records" were improperly withheld and that any "private phone records of Police Chief Anthony Cobb * * * should be a public record because the private phone was used to conduct business on behalf of the public."[2]

On April 4, 2016, this office sent a copy of the Request for Review to the City and requested a detailed written explanation of the measures taken by the City to search for Chief Cobb's phone records from April 19, 2014, communications to or from Chief Cobb containing the words "Bryant" or "Harvey" in 2014, and communications to or from Chief Cobb containing the words "martel" or "miller" in September 2015. Among other things, we asked the City to include in its response a description of any efforts the City made to determine whether or not Chief Cobb or any other City employees or officials maintain responsive communications on personal cellphones that are not in the City's physical custody and to address whether the City construes communications pertaining to the transaction of public business which were transmitted on personal cellphones as "public records" subject to the requirements of FOIA. On April 13, 2016, the City provided a written response that addressed Chief Cobb's personal cellphone bill, City-issued cellphone bill, office landline phone, and e-mails. On April 14, 2016, this office requested additional information concerning records generated on cellphones that pertain to the transaction of public business. On April 27, 2016, the City issued a supplemental response. Mr. Hettinger did not reply to either response.

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[1]E-mail from Johnathan Hettinger, News Reporter, *The News-Gazette*, to foiopolice@cichampaign.il.us

[2]E-mail from Johnathan Hettinger, News Reporter, *The News-Gazette*, to Public Access Bureau, Office of the Attorney General (March 29, 2016).

DETERMINATION

Phones Bills and Communications on Personal Cellphones and Personal E-mail Accounts

To analyze the adequacy of the City's response to the FOIA request, this office must first determine whether communications sent or received on Chief Cobb's personal cellphone and the phone bill for his personal cellphone are subject to the requirements of FOIA. Section 3(a) of FOIA (5 ILCS 140/3(a) (West 2014)) provides that "[e]ach public body shall make available to any person for inspection or copying all public records, except as otherwise provided in Sections 7 and 8.5 of this Act." FOIA defines "[p]ublic records" as:

> all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, electronic communications, recorded information and all other documentary materials pertaining to the transaction of public business, regardless of physical form or characteristics, having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body. 5 ILCS 140/2(c) (West 2015 Supp.).

The City's response to this office stated that Chief Cobb's personal cellphone bill is not subject to the requirements of FOIA because it was not prepared by and for, used by, received by, in the possession of, or under the control of the City. For similar reasons, the City's supplemental response to this office stated that unless e-mails or text messages pertaining to the transaction of public business were sent or received on a personal cellphone via a City e-mail account, those communications also are not public records: "The scale does not tip in favor of disclosure because the record 'was allegedly used to conduct public business.'"[3]

However, a federal appeals court and courts in other states – including those with statutes defining "public records" in a manner similar to the definition of that term in Illinois FOIA – have concluded that, based on those definitions as well as public policy concerns, public officials cannot skirt the requirements of FOIA by conducting public business on personal e-mail accounts and personal electronic devices. Most recently, the District of Columbia Court of Appeals considered a federal agency's argument that e-mails pertaining to the agency's business and policymaking "were 'beyond the reach of FOIA'" because the agency's director maintained them "in an 'account' that 'is under the control of the Woods Hole Research

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[3]Letter from Laura J. Hall, Assistant City Attorney, City of Champaign, to Steve Silverman, Assistant Bureau Chief, Public Access Bureau (April 27, 2016), at 3.

Center, a private organization.'" *Competitive Enterprise Institute v. Office of Science & Technology Policy*, No. 15-5128, 2016 WL 3606551, at *1 (D.C. Cir. July 5, 2016). The court disagreed, stating that there was no indication that the private organization had exclusive control of the e-mails or that the agency director was unable to access the e-mail account: "If the agency head controls what would otherwise be an agency record, then it is still an agency record and still must be searched or produced." *Competitive Enterprise Institute,* No. 15-5128, 2016 WL 3606551, at *4. The court added that the agency's position was incompatible with the purpose of federal FOIA (5 U.S.C. § 552 *et seq.* (2012)):

> The Supreme Court has described the function of FOIA as serving "the citizens' right to be informed about what their government is up to." If a department head can deprive the citizens of their right to know what his department is up to by the simple expedient of maintaining his departmental emails on an account in another domain, that purpose is hardly served. It would make as much sense to say that the department head could deprive requestors of hard-copy documents by leaving them in a file at his daughter's house and then claiming that they are under her control. *Competitive Enterprise Institute,* No. 15-5128, 2016 WL 3606551, at *4.

In a concurring opinion, Judge Srinivasan further stated that "when a current official holds agency records, we ordinarily would expect the agency to control the documents for purposes of responding to a FOIA request." *Competitive Enterprise Institute,* No. 15-5128, 2016 WL 3606551, at *5.

Similarly, in *O'Neill v. City of Shoreline*, 170 Wash. 2d 138, 240 P.3d 1149 (Washington 2010), the Washington Supreme Court considered whether metadata from a chain of e-mails which a city's deputy mayor sent to her personal e-mail account and accessed on her home computer constituted public records under Washington's Public Records Act (PRA) (RCW 42.56.001 *et seq.* (2005)). The initial e-mail was sent from a private citizen to another private citizen, and then forwarded to several individuals, including the deputy mayor, who in turn forwarded it to her personal e-mail account and to other city officials. *Shoreline*, 170 Wash. 2d at 142-43, 240 P.3d at 1151. The city provided metadata from several e-mails, but not from the e-mail forwarded to the deputy mayor's personal e-mail account because she claimed to have inadvertently deleted it. *O'Neill*, 170 Wash. 2d at 143, 240 P.3d at 1151-52. Much like the Illinois FOIA, the Washington Public Records Act (PRA) defined "public record"[4] as: "any writing containing information relating to the conduct of government or the performance of any [internal citation] governmental or proprietary function prepared, owned, used, or retained by

[4]Former RCW 42.56.010 (2005) (codified as former RCW 42.17.020(41) (2005)).

any state or local agency regardless of physical form or characteristics." *O'Neill*, 170 Wash. 2d at 146-47, 240 P.3d at 1153. The court held that the e-mail in question was clearly a public record and that metadata of such an e-mail is also a "public record" because it may relate "to the conduct of government and is important for the public to know. * * * Our broad PRA exists to ensure that the public maintains control over their government, and we will not deny our citizenry access to a whole class of possibly important government information." *O'Neill*, 170 Wash. 2d at 147, 240 P.3d at 1154. The court directed the city to search the hard drive of the deputy mayor's home computer:

> If it is possible for the City to retrieve this information, the PRA requires that it be found and released to the [requesters]. * * * We note that this inspection is appropriate only because [the deputy mayor] used her personal computer for city business. ***If government employees could circumvent the PRA by using their home computers for government business, the PRA could be drastically undermined.*** (Emphasis added.) *O'Neill*, 170 Wash. 2d at 150, 240 P.3d at 1155.

Similarly, Pennsylvania appellate courts have held that e-mails exchanged by public officials on personal e-mail accounts and personal computers are public records subject to that state's Right to Know Law (RTKL) (65 P.S. § 67.101 *et seq.* (West 2014)). Section 102 of RTKL (65 P.S. § 67.102 (West 2014)) defines a "[p]ublic record" as a "record * * * of a Commonwealth or local agency[ ]" that is not protected by a privilege or exempt under RTKL or any other federal or state law or regulation or judicial order or decree. "Record" is defined as:

> Information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency. The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image-processed document. 65 P.S. §67.102 (West 2014).

Taken together, these provisions are roughly equivalent to the definition of "public record" in section 2(c) of FOIA, except that RTKL excludes information that is exempt from disclosure.

In *Mollick v. Township of Worcester*, 32 A.3d 859 (Pa. Commw. 2011), a Pennsylvania appellate court employed the above definitions in analyzing whether e-mails related to public business which were exchanged between township supervisors on personal computers and personal e-mail accounts were "public records" under the RTKL. The trial court

ruled that they were not because e-mails "contained on the Supervisors' personal computers and personal email accounts are neither of the Township nor are they to be construed to be in possession of the Township." *Mollick*, 32 A.3d at 864. In reversing that decision, the appellate court emphasized that because the township was governed by a board of supervisors pursuant to statute, their e-mails to each other concerning Township business are Township records irrespective of their physical location:

> [R]egardless of whether the Supervisors herein utilized personal computers or personal email accounts, if two or more of the Township Supervisors exchanged emails that document a transaction or activity of the Township and that were created, received, or retained in connection with a transaction, business, or activity of the Township, the Supervisors may have been acting as the Township, and those emails could be "records" "of the Township." As such, any emails that meet the definition of "record" under the RTKL, even if they are stored on the Supervisors' personal computers [citation] or in their personal email accounts, would be records of the Township. *Mollick*, 32 A.3d at 864.

See also Barkeyville Borough v. Stearns, 35 A.3d 91, 96-97 (Pa. Commw. Ct. 2012) (e-mails exchanged through personal e-mails accounts in which members of a city council discussed public business with each other constituted public records in the "constructive possession" of the city under RTKL: "If this Court allowed Council members to discuss public business through personal email accounts to evade the RTKL, the law would serve no function and would result in all public officials conducting public business via personal email."); *but see In re: Silberstein*, 11 A.3d 629, 633 (Pa. Commw. Ct. 2011) (e-mails exchanged by a township commissioner and citizens – rather than other members of the public body – via the commissioner's personal e-mail account and personal computer are not "public records" under the RTKL because the "commissioner is not a governmental entity. He is an individual public official with no authority to act alone on behalf of the Township.").

In addition, an Arkansas appellate court considered whether public employees' personal e-mails were subject to the Arkansas FOIA (Ark. Code Ann. §25-19-101 *et seq.* (West 2002)) in the context of a former public employee's appeal of the denial of unemployment benefits. *Bradford v. Director, Employment Security Department*, 83 Ark. App. 332, 128 S.W.3d 20 (Ark. Ct. App. 2003). There, the appellant asserted that he was entitled to unemployment benefits partly because he resigned from his job with the Governor's Office after being pressured to commit illegal acts. *Bradford*, 83 Ark. App. at 338-40, 128 S.W.3d at 23-24. Among other things, the appellant alleged that he was "asked by the governor's staff to violate Arkansas's Freedom of Information Act by communicating with the governor at his private email

address rather than his official one[.]" *Bradford*, 83 Ark. App. at 344, 128 S.W.3d at 27. The court ruled that doing so did not violate the law because e-mails sent from public officials' personal e-mail accounts were not excluded from the requirements of the Act:[5]

> The creation of a record of communications about the public's business is no less subject to the public's access because it was transmitted over a private communications medium than it is when generated as a result of having been transmitted over a publicly controlled medium. Emails transmitted between Bradford and the governor that involved the public's business are subject to public access under the Freedom of Information Act, whether transmitted to private email addresses through private internet providers or whether sent to official government email addresses over means under the control of the State's Division of Information Services. *Bradford*, 83 Ark. App. at 345, 128 S.W.3d at 27-28.

The Public Access Bureau finds the reasoning in these cases to be persuasive and consistent with the purpose of Illinois FOIA. *See Wisnasky-Bettorf v. Pierce*, 2012 IL 111253, ¶16, 965 N.E.2d 1103, 1106 (2012) (the primary goal is to ascertain and give effect to the intent of the General Assembly.) FOIA is intended to ensure public access to "full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of this Act." 5 ILCS 140/1 (West 2014). Further, the General Assembly expressly contemplated that because "technology may advance at a rate that outpaces its ability to address those advances legislatively[ ] * * * this Act should nonetheless be interpreted to further the declared policy of this Act that public records shall be made available upon request except when denial of access furthers the public policy underlying a specific exemption." 5 ILCS 140/1 (West 2014).

FOIA was enacted by Public Act 83-1013, effective July 1, 1984 – before e-mail and text messages became common modes of communication. Despite these and other advances

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[5]Arkansas FOIA defines "[p]ublic records" as:

> writings, recorded sounds, films, tapes, electronic or computer-based information, or data compilations in any medium required by law to be kept or otherwise kept and that constitute a record of the performance or lack of performance of official functions that are or should be carried out by a public official or employee, a governmental agency, or any other agency or improvement district that is wholly or partially supported by public funds or expending public funds. All records maintained in public offices or by public employees within the scope of their employment shall be presumed to be public records.

in technology, the original definition of "[p]ublic records" has remained largely unchanged.[6] Interpreting the definition of "public records" in FOIA to exclude communications pertaining to the transaction of public business which were sent from or received on personal cellphones and personal e-mail accounts of public employees and public officials would be contrary to the General Assembly's intent of ensuring public access to full and complete information regarding the affairs of government. Such an interpretation would yield absurd results by enabling public officials to sidestep FOIA and conceal how they conduct their public duties. *People v. Hunter*, 2013 IL 114100, ¶13, 986 N.E.2d 1185, 1189 (2013) (a reviewing body "presumes that the legislature did not intend to create absurd, inconvenient, or unjust results."). FOIA cannot reasonably be construed to give public bodies the option of operating in secrecy by communicating through personal cellphones and personal e-mail accounts. Ill. Att'y Gen. PAC Req. Rev. Ltr. 40576, issued May 27, 2016.

Accordingly, the Public Access Bureau concludes that communications pertaining to the transaction of public business that were sent or received on Chief Cobb's personal cellphone or personal e-mail account, and portions of his personal cellphone bill documenting those communications, if any, are "public records" under the definition of that term in section 2(c) of FOIA. Because Mr. Hettinger's Request for Review appeared to assert that all records of Chief Cobb's personal cellphone are public records because that phone was allegedly used to conduct public business, this office notes that the plain language of section 2(c) of FOIA limits the definition of "public records" to records pertaining to the transaction of public business. Cellphone communications and portions of bills concerning personal matters that are unrelated to public business are not subject to the requirements of FOIA and therefore are not responsive to the request. The fact that a device is used to send or receive public records does not transform all communications sent or received on the device, including those with no connection to public business, into public records.

Section 7(1)(c) of FOIA

The City's response to this office also emphasized that Chief Cobb has a privacy interest in records of his personal phone and that Mr. Hettinger should be required to provide an explanation of his efforts to obtain this information from alternatives sources and "why the public interest in this personal phone bill outweighs Anthony Cobb's privacy rights."[7] This

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[6]"Public records" was defined to include "all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, recorded information and all other documentary materials, regardless of physical form or characteristics, having been prepared, or having been or being used, received, possessed or under the control of any public body." Ill. Rev. Stat. 1984, ch. 116, par. 202(c).

[7]Letter from Laura J. Hall, Assistant City Attorney, City of Champaign, to Steve Silverman, Assistant Bureau Chief, Public Access Bureau (April 13, 2016), at 3.

office construes that as an assertion of section 7(1)(c) of FOIA (5 ILCS 140/7(1)(c) (West 2015 Supp.)), which exempts from disclosure:

> Personal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information. "Unwarranted invasion of personal privacy" means the disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information. ***The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy.*** (Emphasis added.)

Because any communications concerning Chief Cobb's transaction of public business or phone bills documenting such communications directly relate to Chief Cobb's public duties, disclosure of records concerning those communications would not constitute an unwarranted invasion of privacy under the plain language of section 7(1)(c) of FOIA. Accordingly, the City has not sustained its burden of demonstrating that any such records are exempt from disclosure pursuant to section 7(1)(c) of FOIA. As discussed above, communications and portions of bills related to personal matters that are unconnected to the transaction of public business are not public records subject to the requirements of FOIA.

Search for Responsive Records

FOIA requires a public body to conduct a "reasonable search tailored to the nature of a particular request." *Campbell v. U. S. Dep't of Justice*, 164 F.3d 20, 28 (D.C. Cir. 1998). A public body is not required to "search every record system[,]" but it "cannot limit its search to only one record system if there are others that are likely to turn up the requested information." *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (1990). A public body's search must be "reasonably calculated to uncover all relevant documents." *Weisberg v. Department of Justice,* 705 F.2d 1344, 1351 (D.C. Cir. 1983). However, a "requester is entitled only to records that an agency has in fact chosen to create and retain." *Yeager v. Drug Enforcement Admin.*, 678 F.2d 315, 321 (D.C. Cir.1982); *see also Miller v. United States Dep't of State,* 779 F.2d 1378, 1385 (8th Cir.1985) ("The fact that a document once existed does not mean that it now exists; nor does the fact that an agency created a document necessarily imply that the agency has retained it.").

With respect to Chief Cobb's City-issued cellphone records from April 19, 2014, the City's response to this office stated that (1) it asked Chief Cobb for records of calls but he does not maintain phone bills from that period; (2) the bills that the City receives for phone

service do not contain details about specific calls; and (3) the City's cellphone provider only maintains records for one year. The City's supplemental response also stated that the call log on the City-issued cellphone only retains records of calls within the past month or so, and that Chief Cobb reported that he does not maintain any records of communications generated on the City-issued cellphone that are responsive to Mr. Hettinger's request. In addition, the City stated that its Information Technology Department unsuccessfully searched Chief Cobb's landline for the relevant period, and that the City searched the paper or electronic files where responsive records could have been saved – including keyword searches for e-mails with the specific names that Mr. Hettinger identified in his request – but did not locate any responsive records. The City's response also stated that it typically only retains e-mails for one year.

The measures taken by the City to locate records other than those related to Chief Cobb's personal cellphone appear to have been reasonably calculated to locate responsive records. *Reyes v. United States Environmental Protection Agency*, 991 F. Supp. 2d 20, 28 (D.D.C., 2014) (federal agency conducted reasonable search for communications concerning a peer review by identifying 31 employees who could potentially have responsive records and asking them to search all electronic and paper files related to the peer review process). The City, however, apparently made no effort to locate responsive communications that may have been exchanged on Chief Cobb's personal cellphone, or to obtain portions of his personal cellphone bill documenting such phone calls, because it incorrectly determined that such records are not subject to the requirements of FOIA. Because the City did not conduct a reasonable search for those records, this office requests that the City ask Chief Cobb to search for and to provide any records of responsive communications involving his personal cellphone. If any responsive records are located, the City must provide those records to Mr. Hettinger subject only to permissible redactions under section 7 of FOIA (5 ILCS 140/7 (West 2015 Supp.)).

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. If you have questions, please contact me at (312) 814-6756. This letter serves to close this matter.

Very truly yours,

[redacted]

STEVE SILVERMAN
Assistant Bureau Chief
Public Access Bureau

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